Deepak Jaikishan v A Santamil Selvi a/p Alau Malay @ Anna Malay (as the executrix of the estate of Balasubramaniam a/l Perumal, deceased) & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-14–05 OF 2016
ZULKEFLI CJ (MALAYA), ZAINUN ALI, ABU SAMAH NORDIN, RAMLY ALI AND BALIA YUSOF FCJJ
18 APRIL 2017

Civil Procedure — Appeal — Notice of — Appellant and eight co-defendants separately applied to strike out respondents' statement of claim in High Court — High Court allowed all eight applications in single judgment — Whether procedurally High Court had made eight separate orders — Whether respondents' filing of single notice of appeal against allowing of all eight applications bad in law and offended r 5(3) of the Rules of the Court of Appeal 1994 — Whether appellant's objection to validity of notice of appeal by way of preliminary objection without a formal application should have been allowed to prevent substantial miscarriage of justice — Rules of the Court of Appeal 1994 rr 3A & 27

The respondents had sued nine defendants, one of whom was the appellant, in the High Court for damages for allegedly committing the tort of conspiracy to cause injury by unlawful means. Each of the defendants filed applications under O 18 r 19 of the Rules of Court 2012 to strike out the respondents' action. The High Court heard all the applications in a single sitting and allowed all the applications in a single judgment after finding that the failure to plead material facts to support the claim for the tort of conspiracy rendered the respondents' claim frivolous and vexatious. Although the High Court set out its grounds for allowing each of the eight applications, the respondents filed a single notice of appeal against the judgment to the Court of Appeal ('the COA'). Contending that the respondents should have filed separate notices of appeal against the allowing of each of the eight applications, eight of the defendants, excepting the appellant, filed separate notices of motion to strike out the notice of appeal for being bad in law. The COA unanimously allowed the notices of motion and struck out the notice of appeal as against the respective parties concerned but held that since the appellant had not challenged the notice of appeal, the same was valid as against him and the appeal was set down for hearing. At the outset of that appeal hearing, the appellant raised a preliminary objection ('PO') that since the COA had held the notice of appeal to be invalid as against his co-defendants, the appeal against him should also be dismissed for the same reason. The COA, however, dismissed the PO, holding that the appellant should have applied by way of

notice of motion to strike out the notice of appeal. The COA proceeded to hear the appeal, set aside the High Court's decision that allowed the appellant's striking out application and ordered the appellant to file his defence. The Federal Court granted the appellant leave to appeal against the COA's decision, inter alia, on the question: (a) whether the validity of a notice of appeal could be challenged by way of a PO; and (b) whether the filing of a single notice of appeal against the High Court's decision on eight separate interlocutory applications complied with the Rules of the Court of Appeal 1994.

Held, allowing the appeal and reinstating and affirming the decision of the High Court:

(1) Although the appellant did not apply by way of notice of motion to strike out the respondents' notice of appeal as required by r 27 of the Rules of the Court of Appeal 1994 ('the RCA 1994'), in the circumstances of the case, the allowing of the preliminary objection would have prevented a substantial miscarriage of justice against the appellant. Since the notice of appeal filed by the respondents was found to be bad in law, there was therefore no proper appeal before the Court of Appeal (see paras 10–11 & 14).

(2) Because the respondents' notice of appeal was deemed to be defective by the Court of Appeal, it was a substantial miscarriage of justice if the case was proceeded forthwith solely against the appellant. This would put the appellant in a difficult situation as he had to answer the case against him on his own; more so in the present case, wherein the respondents' cause of action against all the defendants, including the appellant, was for the tort of conspiracy to cause injury by unlawful means and the claims against all the other alleged co-conspirators had been dismissed and/or struck out (see para 13).

(3) Rule 5(3) of the RCA 1994 provided that a notice of appeal shall substantially be in Form 1 in the First Schedule. The word 'shall' denoted that it was mandatory for the parties to comply with the said rule. The respondents should have filed separate notices of appeal against the decision of the High Court in allowing the defendants' separate applications to strike out the respondents' statement of claim (see para 17).

(4) The main purpose of r 5(3) was to allow the opposing parties to be able to answer their cases respectively. Each of the defendants had filed a separate application to strike out the statement of claim and each application had different grounds in support thereof, different filing dates and even different counsel. The High Court delivered a single judgment encompassing all the applications. By way of procedural rules, there were eight separate orders made by the High Court. In her grounds of judgment, the High Court judge had explained in detail her decision

to allow the application of each party. The respondents were in a position to identify the relevant points in the judgment that they were dissatisfied with and thereafter to file separate notices of appeal against all the defendants setting out the details of the decisions in the notices of appeal (see paras 19–20).

[Bahasa Malaysia summary

Responden-responden telah menyaman sembilan defendan, salah seorang yang merupakan perayu, di Mahkamah Tinggi untuk ganti rugi kerana dikatakan telah melakukan tort konspirasi yang menyebabkan kecederaan akibat cara yang menyalahi undang-undang. Setiap daripada defendan telah memfailkan permohonan berasingan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tindakan responden-responden. Mahkamah Tinggi telah mendengar kesemua permohonan dalam satu perbicaraan dan membenarkan kesemua permohonan dalam satu penghakiman selepas penemuan bahawa kegagalan untuk mempli fakta material bagi menyokong tuntutan untuk tort konspirasi menyebabkan tuntutan responden-responden remeh dan menyusahkan. Walaupun Mahkamah Tinggi menyatakan alasannya untuk membenarkan setiap daripada sembilan permohonan itu, responden-responden telah memfailkan satu notis rayuan sahaja terhadap penghakiman kepada Mahkamah Rayuan ('MR'). Berhujah bahawa responden-responden hendaklah memfailkan notis-notis rayuan yang berasingan dan bukan membenarkan setiap daripada lapan permohonan itu, lapan berhubung defendan, kecuali perayu, memfailkan notis-notis usul yang berasingan untuk membatalkan notis rayuan terhadap pihak-pihak masing-masing yang berkaitan tetapi memutuskan bahawa oleh kerana perayu tidak mencabar notis rayuan itu, yang sama adalah sah terhadapnya dan rayuan itu ditetapkan untuk perbicaraan. Pada mula perbicaraan rayuan tersebut, perayu telah menimbulkan bantahan awal ('BA') bahawa oleh kerana MR telah memutusan notis rayuan itu tidak sah terhadap defendan-defendan bersamanya, rayuan terhadapnya juga hendaklah ditolak untuk sebab yang sama MR, walau bagaimanapun, telah menolak BA itu, dengan memutuskan bahawa perayu sepatutnya telah memohon melalui notis usul untuk membatalkan notis rayuan itu. MR meneruskan untuk mendengar rayuan itu, dengan mengetepikan keputusan Mahkamah Tinggi yang membenarkan permohonan pembatalan perayu dan memerintahkan perayu memfailkan pembelaannya. Mahkamah Persekutuan telah memberikan perayu kebenaran untuk merayu terhadap keputusan MR, antara lain, berhubung persoalan: (a) sama ada kesahan notis rayuan boleh dicabar melalui BA; dan (b) sama ada pemfailan satu notis rayuan terhadap keputusan Mahkamah Tinggi berhubung lapan permohonan interlokutori yang berasingan mematuhi Kaedah-Kaedah Mahkamah Rayuan 1994.

Diputuskan, membenarkan rayuan dan mengembalikan semula dan mengesahkan keputusan Mahkamah Tinggi:

(1) Walaupun perayu tidak memohon melalui notis usul untuk membatalkan notis rayuan responden-responden sepertimana dikehendaki oleh k 27 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR 1994'), dalam keadaan kes ini, dengan membenarkan bantahan awal itu akan menghalang pelaksanaan keadilan yang salah yang substantial berlaku terhadap perayu. Oleh kerana notis rayuan telah difailkan oleh responden-responden didapati tidak mengikut undang-undang, oleh itu tiada rayuan yang teratur di hadapan Mahkamah Rayuan (lihat perenggan 10–11 & 14).

(2) Oleh kerana notis rayuan responden-responden dianggap cacat oleh Mahkamah Rayuan, ia adalah pelaksanaan keadilan yang salah jika kes ini diteruskan hanya terhadap perayu sahaja. Ini meletakkan perayu dalam keadaan sukar kerana dia perlu menjawab kes terhadapnya dengan sendiri; lebih-lebih lagi dalam kes ini, di mana kausa tindakan responden-responden terhadap semua defendan-defendan, termasuk perayu, adalah untuk tort konspirasi yang menyebabkan kecederaan oleh cara yang menyalahi undang-undang dan tuntutan-tuntutan terhadap semua pelaku konspirasi bersama yang dikatakan itu telah ditolak dan/atau dibatalkan (lihat perenggan 13).

(3) Kaedah 5(3) KMR 1994 memperuntukkan bahawa suatu notis rayuan hendaklah secara substantial dalam Borang 1 Jadual Pertama. Perkataan 'shall' menandakan bahawa ia adalah mandatori untuk pihak-pihak mematuhi kaedah tersebut. Responden-responden sepatutnya memfailkan notis-notis rayuan secara berasingan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan berasingan defendan-defendan untuk membatalkan penyataan tuntutan responden-responden (lihat perenggan 17).

(4) Tujuan utama k 5(3) adalah untuk membenarkan pihak-pihak yang membangkang agar dapat menjawab kes-kes mereka masing-masing. Setiap daripada defendan-defendan telah memfailkan permohonan berasingan untuk membatalkan penyataan tuntutan dan setiap permohonan mempunyai alasan skongan yang berbeza, tarikh pemfailan yang berbeza dan malah peguam yang berbeza. Mahkamah Tinggi menyampaikan satu penghakiman yang merangkumi semua permohonan tersebut. Melalui kaedah prosedur, terdapat lapan perintah berasingan yang dibuat oleh Mahkamah Tinggi. Dalam alasan penghakiman beliau, hakim Mahkamah Tinggi telah menjelaskan secara terperinci keputusannya untuk membenarkan permohonan bagi setiap pihak. Responden-responden berada dalam kedudukan untuk mengenal pasti perkara-perkara yang relevan dalam penghakiman tersebut bahawa mereka tidak berpuas hati dengan dan kemudian memfailkan notis-notis rayuan yang berasingan terhadap semua defendan-defendan dengan

menyatakan butir-butir keputusan dalam notis-notis rayuan tersebut (lihat perenggan 19–20).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1686–1805.

Cases referred to

A Santamil Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors [2015] 4 MLJ 583; [2015] 4 CLJ 1016, CA (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (folld)

Legislation referred to

Rules of the Court of Appeal 1994 rr 3A, 5(3), 27, First Schedule, Forms 1, 4

Rules of Court 2012 O 18 r 19

Muhammad Shafee Abdullah (Sarah Abishegam with him) (Shafee & Co) for the appellant.

Americk Sidhu (Americk Sidhu) for the respondents.

Jeremy Khalif Lee (Malaysian Bar Council) watching brief for the respondents.

Zulkefli CJ (Malaya) (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the appeal by the respondents against the decision of the High Court. The appellant in this case was the eighth defendant and the respondents were the plaintiffs before the High Court. For ease of reference we shall refer the parties as they were in the High Court.

[2] The plaintiffs filed a writ in the High Court at Kuala Lumpur to claim for damages against the defendants for the tort of conspiracy to cause injury by unlawful means. The plaintiffs filed the claim against nine defendants including the eighth defendant. Each of the nine defendants including the eighth defendant filed an application to strike out the plaintiffs' writ under O 18 r 19 of the Rules of Court 2012 ('the RC 2012'). After hearing these applications in a single sitting, the learned High Court judge allowed these applications with costs.

[3] The learned High Court judge had clearly stated in her judgment the grounds of allowing each application of the defendants. Essentially, all of the

applications were allowed on the grounds that the plaintiffs had failed to plead material facts that would sustain their claim against all of the nine defendants. The failure to plead material facts to prove the existence of a tort of conspiracy against the nine defendants tantamount to bare allegations and that the plaintiffs' statement of claim is deemed to be frivolous and vexatious. All of the defendants' application were allowed with cost.

[4] Dissatisfied with the decision of the High Court, the plaintiffs then appealed to the Court of Appeal. The plaintiffs filed only one notice of appeal against the decision made by the learned High Court judge. The notice of appeal reads:

> TAKE NOTICE THAT A Santamil Selvi a/p Alau Malay @ Anna Malay, Kishen a/l Balasubramaniam, Menaga a/p Balasubramaniam and Reeshi a/l Balasubramaniam,being dissatisfied with the decision of the Honourable Justice Datuk Hasnah Bte Dato' Mohamed Hashim given at the High Court Kuala Lumpur on the 11th day of December 2014, appeals to the Court of Appeal against the whole of the said decision granting the Order-in-Terms of all the Defendants' applications to strike out the Plaintiffs' claims under Order 18 rule 19(1) of the Rules of Court 2012.

[5] Save for the eighth defendant, all of the defendants filed seven separate notices of motion wherein they applied for the notice of appeal of the plaintiffs to be struck out on the grounds that the notice of appeal was bad in law for not filing a separate notice of appeal against the decision of the High Court in allowing the defendants separate application to strike out the plaintiffs' statement of claim. The Court of Appeal heard these notices of motion on 10 May 2015. The Court of Appeal unanimously allowed these applications and the plaintiffs' notice of appeal was struck out with costs. Nevertheless, the Court of Appeal held that the plaintiffs' notice of appeal against the eighth defendant was still valid presumably on the basis that the eighth defendant had not filed a notice of motion for his application. A hearing date of the appeal against the eighth defendant by the plaintiffs was fixed for it to be heard.

[6] The plaintiffs' appeal against the eighth defendant was heard on 2 October 2015 before another panel of the Court of Appeal. At the preliminary stage of the hearing, learned counsel for the eighth defendant raised a preliminary objection arguing that since the notice of appeal of the plaintiffs was bad in law, there was therefore no proper appeal before the Court of Appeal and the plaintiffs' appeal should be dismissed.

[7] The Court of Appeal dismissed the preliminary objection of the eighth defendant on the ground that the eighth defendant should have filed a proper application by way of notice of motion to strike out the plaintiffs' appeal against him. The Court of Appeal proceeded to hear the appeal. The Court of

Appeal allowed the appeal and set aside the decision of the High Court. The eighth defendant was ordered to file his defence.

[8] The eighth defendant filed an application for leave to appeal against the decision of the Court of Appeal in dismissing his preliminary objection. The Federal Court on 18 December 2015 allowed the eighth defendant's leave application with the following questions of law:

(1) whether as a matter of procedural law, an objection pertaining to the notice of appeal being defective and/or bad in law can be undertaken by way of a mere preliminary objection?

(2) whether the filing of a single notice of appeal in respect of a decision on eight separate and distinct interlocutory applications is in compliance with the procedural rules as set out in the Rules of the Court of Appeal 1994? and

(3) whether as a matter of law a claim in conspiracy to injure can be maintained and/or is valid when the claims against all other alleged co-conspirators have been dismissed and/or struck out on the basis that there was no reasonable cause of action raised by the plaintiffs?

DECISION OF THIS COURT

[9] On the first question posed before this court, the main argument of learned counsel for the eighth defendant is that the Court of Appeal should have invoked its own inherent jurisdiction to intervene and set aside the defective notice of appeal of the plaintiffs in the light of the existing ruling that it had struck out the same notice of appeal against all the other defendants. Learned counsel for the eighth defendant highlighted to us several case authorities to show that the court has the authority to exercise its discretion to prevent any form of injustice. Learned counsel for the plaintiffs, however, submitted that the issue now raised by the eighth defendant has become academic in view of the fact that the earlier panel of the Court of Appeal had ruled that the eighth defendant should file by way of notice of motion to strike out the plaintiffs' notice of appeal in the same mode of application the other defendants had done so.

[10] We noted that the provision of r 27 of the Rules of the Court of Appeal 1994 ('the RCA 1994') states that all applications to the Court of Appeal must be made by way of a motion as provided for in Form 4 in the First Schedule to the RCA 1994. It is trite that parties to a proceeding must file by way of a notice of motion for any application that needs to be decided by the Court of Appeal.

[11] The eighth defendant did not file any application by way of notice of motion to strike out the plaintiffs' notice of appeal. Instead, the eighth

defendant raised during the hearing that the notice of appeal filed by the plaintiffs was deemed bad in law by way of preliminary objection. The provision on preliminary objection is provided for under r 3A of the RCA 1994 as follows:

> A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[12] At first glance a reading of the above provision implies that a preliminary objection on the grounds of non-compliance to any of the provisions in RCA 1994 cannot be allowed. However, if it is found that the non-compliance of any of the provision in RCA 1994 has occasioned a substantial miscarriage of justice, then the preliminary objection may be allowed.

[13] We are of the view that because the notice of appeal filed by the plaintiffs has been deemed to be defective by the Court of Appeal, it will be a substantial miscarriage of justice if the case is to be proceeded forthwith solely against the eighth defendant. This will put the eighth defendant in a difficult situation as he has to answer the case against him on his own. More so in the present case wherein the plaintiffs' cause of action against all the nine defendants including the eighth defendant is for the tort of conspiracy to cause injury by unlawful means and the claims against all other alleged co-conspirators have been dismissed and/or struck out. On this point we would like to reaffirm the view expressed by the Federal Court in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501, wherein Abdul Hamid Mohamad FCJ (as he then was), had made the following observation at p 547 as follows:

> Secondly, this court has repeatedly held that it has inherent jurisdiction 'to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court'.

[14] We are of the considered view that by allowing the preliminary objection, it would have definitely prevented a substantial miscarriage of justice against the eighth defendant. Since the notice of appeal filed by the plaintiffs was found to be bad in law there is therefore no proper appeal before the court. In the circumstances of this case, we would answer the first question of law in the affirmative.

[15] We shall now deal with the second question of law posed before us. The second question of law is whether the filing of a single notice of appeal in

respect of a decision on eight separate and distinct interlocutory applications is in compliance with the procedural rules as set out under the RCA 1994.

[16] As earlier alluded to, the eighth defendant and all the other defendants in this case filed separate application for the striking out the plaintiffs' statement of claim at the High Court. The plaintiffs, having appealed against the decision of the High Court in allowing these applications, filed only a single notice of appeal against the decision of the learned judge of the High Court.

[17] It is to be noted that r 5(3) of the RCA 1994 pertaining to civil appeal to the Court of Appeal provides that a Notice of Appeal shall substantially be in Form 1 in the First Schedule. The word 'shall' denotes that it is mandatory for the parties to comply with the provision under the said rule. We are of the view that the plaintiffs should have filed separate notices of appeal against the decision of the High Court in allowing the defendants separate applications to strike out the plaintiffs' statement of claim.

[18] On this issue of the plaintiffs having to file a separate notice of appeal, useful reference can be made to the case of *A Santamil Selvi a/p Alau Malay @ Anna Malay & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors* [2015] 4 MLJ 583; [2015] 4 CLJ 1016. This is the very case where the Court of Appeal had heard the application by way of notice of motion of all the other eight defendants to strike out the plaintiffs' notice of appeal against the decision of the High Court of our current case. The Court of Appeal amongst others had made the following observations:

> [13] It is, therefore, a statutory requirement that the notice of appeal must be in the prescribed Form 1. We agree with the learned counsel for the first and second respondents that the RCOA envisages two situations: one where a dissatisfied party appeals against one decision and second, where a dissatisfied party appeals against more than one decision. To that, we must add that it includes also a situation where a dissatisfied party appeals against part only of the decision or decisions given.
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> [14] In our view, where the appeal is against one decision involving a single respondent or involving more than one respondent in a joint action, it will be in order for the appellant to state in a single notice of appeal that he is appealing against 'the whole of the said decision'. But where the appeal is against more than one decision arising from the separate interlocutory application made by different parties to the action, it is incumbent on the appellant to set out the details of the decisions in the notice of appeal.
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> [15] In the present case, since more than one decision was given by the High Court in favour of nine different applicants arising from eight separate and distinct applications, it was imperative for the appellants to set out the details of each and every one of the decisions that they were appealing against. We do not think it was sufficient for the appellants to state in general terms in a single notice of appeal that their appeal was against the 'whole of the said decision' (in the singular) without specifying the particulars of the decisions appeal against.

[19] We are in agreement with the above views expressed by the Court of Appeal. The main purpose of r 5(3) of the RCA 1994 is to allow the opposing parties to be able to answer their cases respectively. The learned High Court judge had, in her grounds of judgment, explained in detail her decision in allowing the striking out application of each party in that separate interlocutory applications. The plaintiffs were in a position to identify the relevant points in the said judgment that they are dissatisfied with and thereafter filed a separate notice of appeal against all the defendants setting out the details of the decisions in the notice of appeal.

[20] It is also to be noted that each of the defendant in the High Court had filed eight separate applications to strike out the plaintiffs' statement of claim. All eight applications had different grounds in support of the respective application, different filing dates and even different counsels. The learned High Court judge delivered a single judgment encompassing all of the eight applications. It is our judgment by way of procedural rules there were eight separate orders made by the learned High Court judge. We would therefore answer the second question posed before us in the negative.

[21] As regards the third question of law posed before us we do not think we should answer it in view of our answers to question 1 and 2.

CONCLUSION

[22] For the reasons abovestated we find there is merit in the appellant's appeal. The appeal by the appellant is allowed with no order as to costs. The decision of the High Court is affirmed and reinstated.

Appeal allowed and decision of High Court reinstated and affirmed.

Reported by Ashok Kumar